Supreme Court, U. S.
FILED
MAR 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-1097

# In the Supreme Court of the United States

OCTOBER TERM, 1979

E. L. FOWLER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*

M. CARR FERGUSON
*Assistant Attorney General*

ROBERT E. LINDSAY
R. RUSSELL MATHER
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1979

---

No. 79-1097

E. L. FOWLER, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## OPINION BELOW

The district court did not render a written opinion. The opinion of the court of appeals (Pet. App.) is reported at 605 F. 2d 181.

## JURISDICTION

The judgment of the court of appeals was entered on October 26, 1979. A petition for rehearing with suggestion for rehearing en banc was denied December 14, 1979. The petition for a writ of certiorari was filed on January 14, 1980 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the district court erred in instructing the jury on the burden of proof with respect to gross receipts and cost of goods sold.

2. Whether petitioner knowingly waived his right to assistance of counsel.

3. Whether the district court erroneously refused to allow petitioner to testify on his behalf at trial.

## STATUTE INVOLVED

Section 7203 of the Internal Revenue Code of 1954 (26 U.S.C.) provides as follows:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

## STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted on five counts of willful failure to file income tax returns for 1971-1975, in violation of 26 U.S.C. 7203. The trial court sentenced him to consecutive one-year terms of



imprisonment on the first three counts and fined him $2,000 on the two remaining counts (II Tr. 122-123). The court of appeals affirmed (Pet. App. 1a-9a).

At trial, the government used the bank deposits method of proof to establish that petitioner, a dealer in gravestones, was required to file income tax returns for 1971 through 1975. Petitioner received gross income in excess of the minimum filing requirements for each of those years (see, *e.g.*, I Tr. 55-58; II Tr. 38-51). A revenue agent testified that during the investigation petitioner told him that he had not filed an income tax return since 1956 because he disagreed with the way that the government spent the money (see, *e.g.*, I Tr. 61-62; II Tr. 31-37). Petitioner produced no evidence and was not allowed to testify himself because he refused to take an oath or otherwise avow that he would tell the truth (II Tr. 62).

## ARGUMENT

1. Petitioner contends (Pet. 4-5) that the trial court's instructions impermissibly shifted the burden of proof to him. In the instruction at issue the district court advised the jury as follows (II Tr. 100):

> To prove the defendant's gross income for the years in question it is incumbent upon the government to establish the cost of the goods sold by the defendant in each of the tax years. In this connection I charge you that it is incumbent upon the prosecution to investigate any leads which may be offered to the government by or on behalf of the defendant as to the cost of goods sold by the defendant in each of the taxable years. If these leads are reasonably susceptible of being checked the government must investigate into the truth of these leads or explanations. After the government has

made a reasonable effort to identify and produce evidence of the cost of goods sold *the burden then shifts to the defendant to produce evidence of additional costs of goods sold.* When the defendant does then offer further evidence of off-setting costs the burden is then on the government to persuade you members of the jury that the costs are not allowable. It just depends on how the situation develops. [Emphasis added.]

Petitioner objects to the portion of the instruction stating that "the burden then shifts to the defendant to produce evidence of additional costs of goods sold." But as the court of appeals observed, the phrase as to which petitioner now complains (not having objected to it at trial) "was in no way integral to the thought that it sought to convey" (Pet. App. 6a). The court therefore correctly concluded that "[t]his mild instruction, touching at most on the burden of production or proceeding and buried in a charge that correctly and repeatedly placed the burden of proof beyond a reasonable doubt on the government, does not constitute [plain] error" (Pet. App. 7a).

Moreover, the instruction simply stated the obvious proposition that, if the defendant wishes to narrow or destroy the spread established by the government between gross receipts and costs of goods sold by proving further costs, it is incumbent upon him to do so. As the court of appeals recognized (Pet. App. 7a), the instruction in no sense shifted to the petitioner any burden that he did not already have. *Siravo* v. *United States*, 377 F. 2d 469 (1st Cir. 1967). Once the government has made a prima facie showing, "the defendant remains quiet at his peril." *Holland* v. *United States*, 348 U.S. 121, 138-139 (1954).



Finally, the phrase to which petitioner objects was immediately followed by the trial court's reminder to the jury that even as to evidence of any additional costs produced by petitioner, the burden of persuasion was on the government to show that they were not allowable—not on the petitioner to show that they were. The court of appeals therefore correctly concluded that the challenged portion of the instruction did not prejudice petitioner because it remained clear under the instruction that even if petitioner failed to come forward with evidence of additional cost of goods sold, the burden remained on the government to prove beyond a reasonable doubt a difference between gross receipts and cost of goods sold that resulted in sufficient gross income to require the filing of an income tax return.

2. Petitioner further contends (Pet. 5-11) that he was deprived of his right to the assistance of counsel at trial. He did not at any time request that an attorney be appointed for him and did not indicate to the court that he was financially unable to engage an attorney.[1] Indeed, petitioner repeatedly asserted at trial that he had an attorney who had not appeared only because he had not had sufficient time to prepare the case (see, *e.g.*, I Tr. 33, 36, 39).

However, petitioner had ample time to employ counsel. More than seven months elapsed between the date of his first arraignment (March 13, 1978) and the day his trial

[1]When asked by the court at the arraignment if he could afford a lawyer, petitioner responded only that he could not afford "the one I would really like * * *" (I Tr. 3). He told the court under oath that he owned his own business, which provided him with "some" income (I Tr. 4-6). However, when asked again by the court if he could afford an attorney, petitioner refused to answer, stating that it "might tend to incriminate me." The court then specifically found that he was financially able to afford counsel (I Tr. 6).

began (October 16, 1978) (see Pet. 5-6). When petitioner appeared without counsel at the October 6 arraignment, after the case had been transferred from the Northern District to the Middle District of Georgia, the court specifically advised him of his right to be represented by an attorney and stated that if he was unable to afford a lawyer the court would appoint one for him (1 Tr. 3-7). The court expressly informed him that his trial would be scheduled for the week of October 16th and urged him to obtain counsel—advising him that it would be unwise for him to attempt to represent himself. The court also emphatically informed him that he would not be allowed to delay the proceeding by waiting until the last moment to seek counsel and request a continuance (1 Tr. 15).

On October 10, 1978, despite the trial court's admonitions, Gary James Joslin, an attorney in Salt Lake City, Utah, whom petitioner had called two days earlier, in turn called the prosecutor and the trial judge to ascertain their feelings about a continuance. The court advised Joslin that it would not grant a continuance. Two days later, on October 12, 1978, petitioner filed a pro se motion for a continuance, attaching an affidavit of Joslin stating that he could not represent petitioner because of inadequate time to prepare. The court denied this motion, and petitioner was not represented by counsel at trial.

Even though petitioner had a right to the assistance of counsel at trial, he was not entitled to use that right to delay the proceedings. The record shows clearly that the district court acted well within the bounds of its discretion in treating petitioner's failure to provide for his own defense in the more than ample time available to him as a waiver of his right to counsel. See *United States* v. *Gates*, 557 F. 2d 1086, 1088 (5th Cir. 1977), cert. denied, 434 U.S. 1017 (1978); *United States* v. *White*, 529 F. 2d 1390,



1393 (8th Cir. 1976); *United States* v. *Casey*, 480 F. 2d 151 (5th Cir.), cert. denied, 414 U.S. 1045 (1973); *United States* v. *Arlen*, 252 F. 2d 491, 494-495 (2d Cir. 1958).[2]

3. Finally, petitioner contends that the district court erred in refusing to allow him to testify at trial. Although a criminal defendant is generally permitted to testify on his own behalf should he so desire (see 18 U.S.C. 3481), a defendant may properly be found to have waived that privilege by conduct that inhibits or obstructs the judicial process. See, *e.g.*, *United States* v. *Ives*, 504 F. 2d 935, 939-946 (9th Cir. 1974), remanded for reconsideration on other grounds, 421 U.S. 944 (1975); *United States* v. *Bentvena*, 319 F. 2d 916, 943-944 (2d Cir.), cert. denied, 375 U.S. 940 (1963). Here, petitioner flatly refused to make any statement that could reasonably be interpreted as a recognition of an obligation to tell the truth; this violated the clear directive of Fed. R. Evid. 603.[3] Petitioner did not merely object to the form of the oath

---

[2]Contrary to petitioner's contention (Pet. 11-12), *United States* v. *White*, *supra*, does not conflict with the decision below. There, the defendant, who appeared at trial without counsel, was convicted on charges of moving government boundary markers in violation of 18 U.S.C. 1858. The court of appeals upheld both the conviction and a $50 fine imposed by the trial court, but vacated a 90-day suspended jail sentence on the ground that the record did not reflect a knowing and intelligent waiver by the defendant of his right to assistance of counsel (529 F. 2d at 1393). Here, however, the court of appeals held on the facts of this case that petitioner had knowingly waived his right to counsel (Pet. App. 8a-9a).

[3]Rule 603 provides:

> Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

propounded by the court. Compare *United States* v. *Looper*, 419 F. 2d 1405 (4th Cir. 1969). Despite the trial court's earnest effort to arrive at a mutually agreeable statement (II Tr. 57-62),[4] petitioner made a blanket claim of a right to make an unsworn statement (II Tr. 58). In addition, petitioner informed the court that he would not, in any event, submit to cross-examination (II Tr. 62). See *United States* v. *Fiore*, 443 F. 2d 112 (2d Cir. 1971), cert. denied, 410 U.S. 984 (1973). Petitioner's assertions that he is "a truthful man" (II Tr. 59) and that he "would not tell a lie to stay out of jail" (II Tr. 61) simply cannot, under the circumstances, be viewed as a serious commitment to tell the truth.

*United States* v. *Bentvena, supra*, upon which petitioner relies (Pet. 13), is not to the contrary. There the trial court found that the defendant had waived the right to testify on his own behalf on account of his violent outbursts and generally disorderly conduct. The court of appeals reversed, stating that while the defendant's conduct might have justified curtailment of his testimony, it did not justify complete foreclosure (319 F. 2d at 944). The court expressly limited its holding to the facts of that case and acknowledged that there might be other circumstances in which a defendant could properly be held to have waived his right to testify (*ibid.*).

---

[4]At one point, the trial court indicated (II Tr. 61) that petitioner would simply have to state: "I state that I will tell the truth in my testimony."



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

M. CARR FERGUSON
*Assistant Attorney General*

ROBERT E. LINDSAY
R. RUSSELL MATHER
*Attorneys*

MARCH 1980